

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 3, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2012AP618-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2010CF57**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTONIO X. JACKSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Antonio Jackson appeals from a judgment of conviction entered upon a jury's guilty verdict for one count of attempted first-degree intentional homicide, and from an order denying postconviction relief. Jackson argues that he is entitled to a new trial because trial counsel provided

ineffective assistance by failing to object to: (1) references to unnamed persons who told the victim that Jackson was the shooter; (2) irrelevant testimony concerning certain items discovered in Jackson's bedroom, including a gun magazine and a digital image of a man's genitalia; and (3) a suggestion in the State's closing argument that Jackson was arrested while hiding in a bedroom. We conclude that none of the asserted errors entitles Jackson to a new trial. As to each claim, counsel's performance was either reasonable or nonprejudicial, or both. We also reject Jackson's claim that he was prejudiced by the cumulative effect of counsel's alleged errors. We affirm.

¶2 In 2010, the victim was present in a park in Racine when he witnessed a grey or silver Pontiac car drive around the block a couple of times and then stop. The driver got out of the car and called the victim over. The victim headed toward the car. When the victim was about fifteen feet away, the driver pulled out a revolver and fired two or three shots. The victim was hit twice, once in the knee and once near his elbow. The shooter fled the scene. The police were called and the victim was transported to the hospital. Before undergoing surgery, the victim told police he did not recognize the shooter, but described him as a dark-skinned black male between the ages of twenty-one and twenty-four years, approximately five feet, three inches to either five feet, five inches or five feet, eight inches in height,<sup>1</sup> and weighing around 135 to 145 pounds. The victim stated that the shooter had gold teeth and was wearing a black hooded sweatshirt and

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<sup>1</sup> The record conflicts as to whether the victim initially reported the range as between five feet, three inches and five feet, five inches or between five feet, three inches and five feet, eight inches. The police report is not part of the record. This discrepancy is irrelevant to our analysis and conclusions.

black saggy jeans with shorts underneath. He described the vehicle as a model year 2000 or 2002 silver Pontiac Grand Prix.

¶3 The next day, after speaking with friends from the neighborhood, the victim informed police that he believed the shooter was named Antonio Jackson. During his second statement to police, the victim gave a slightly different description of the shooter's height and weight<sup>2</sup> and described the car as a Pontiac Grand Am, rather than a Grand Prix. After viewing a photo lineup, the victim identified Jackson as the shooter. The victim told police he was "a hundred percent sure" of his identification.

¶4 Several days after the shooting, the police executed a search warrant at Jackson's residence. There was a silver Grand Am in the driveway, but Jackson was not inside the residence. Police recovered from Jackson's bedroom a black hooded sweatshirt and black sweatpants. Officers also recovered a digital camera and a semiautomatic gun magazine. On the camera were pictures of Jackson, some of which appeared to be images of his penis. It was undisputed that the magazine could not have been used in the shooting. Jackson did not return to the residence and in February, 2010, he was extradited from Arkansas.

¶5 The case was eventually tried to a jury. The victim testified that he was familiar with Jackson before the shooting incident and had met him once before at a friend's house. The victim testified that he recognized Jackson at the time of the shooting and would not have otherwise walked toward his car. The

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<sup>2</sup> It appears from the record that the victim's second description was of a dark-skinned black male approximately five feet, five inches to five feet, seven inches in height, with a weight between 140 to 160 pounds. At trial, an officer testified that Jackson was five feet, six inches in height and 150 pounds.

victim testified that the day after the shooting, he discussed the incident with people from the neighborhood and described to them the shooter and car. The victim testified that “everybody” said they recognized the shooter from his description and provided Antonio Jackson’s name “like three times.” The victim testified that he was able to identify Jackson’s lineup photo “[f]rom a friend’s house and from the incident.”

¶6 Officer John Principe testified that the victim contacted him the day after the shooting and said he had received information from a friend that the shooter was named Antonio Jackson. Based on this information, Principe put together a photo lineup and the victim identified Jackson’s photo. Both Principe and another investigating officer testified that the victim never told them about his prior familiarity with Jackson and, in fact, stated he had never seen the shooter before.

¶7 During their investigation, officers learned that Jackson’s car was registered to his ex-girlfriend. At trial, the ex-girlfriend testified that in January of 2010, Jackson drove a silver Pontiac Grand Am that was registered in her name. The girlfriend’s mother testified that several days after the shooting, while driving her daughter to the police station for an interview, she noticed her daughter exchanging text messages with Jackson. Her daughter told her that Jackson sent a text instructing her to tell police she did not know anything. The mother testified that she took her daughter’s phone and, without identifying herself, exchanged texts with Jackson. She testified that she showed one of the texts to an officer. The officer testified that the text instructed the ex-girlfriend to tell police she had possession of the car “all last week.”

¶8 Jackson testified at trial and denied shooting the victim. Consistent with the victim's testimony, Jackson testified that he and the victim were acquaintances before the shooting. Jackson acknowledged texting his ex-girlfriend and asking her to tell police she had possession of the car. He testified that this was because he was involved in a single-car accident with the Pontiac and did not want to get into trouble. Jackson testified that he left Wisconsin to visit his grandmother in Arkansas and was not aware he was a suspect in the shooting. On cross-examination, the State asked Jackson if he had been discovered by Arkansas police while hiding in a bedroom. Jackson answered no and stated that he was apprehended while sleeping.<sup>3</sup> In its closing argument, the State argued:

You have Mr. Jackson heading out, going out of town, being in the state of Arkansas shortly after, ... You have ... either he went down there to visit his grandmother, he gave up on school, ... he gave up on the girl that he had up here, and went down to be with his grandma or that he was trying to run from the police. *You have him hiding in a bedroom at his grandma's house versus him sleeping in the bedroom when the police come looking for him at his grandma's house in Arkansas.* (Emphasis added).

¶9 Also on cross-examination, Jackson denied ownership of the digital camera found during the search of his residence. This prompted a lengthy discussion outside the presence of the jury, wherein the State sought to introduce pictures discovered on the camera in order to prove that Jackson had control of the camera and, thus, of the bedroom containing the black clothing seized by police.<sup>4</sup>

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<sup>3</sup> The State asked one follow-up question suggesting that a police report from Arkansas indicated that Jackson was hiding in the bedroom, and Jackson maintained that he was asleep in bed.

<sup>4</sup> Prior to Jackson's testimony, the parties argued about the admissibility of the camera pictures. Trial counsel objected to the introduction of the pictures as irrelevant, and the trial court ruled that the State could introduce a picture of an unidentified female.

Some of the pictures depicted images of male genitalia. The trial court determined that if the State wished to use the camera to connect Jackson to the bedroom, it could ask “if there are photographs of him on the camera and whether or not there are photographs of private personal images contained on the camera.” The court added that beyond that, there would be “no mention of the word penis.” The trial court ruled that the State could not show the pictures to the jury.

¶10 The parties went back on the record and the following exchange transpired:

State: Mr. Jackson, on that camera, are there pictures of you?

Defendant: Yes.

State: And are there what could be called very private or personal pictures of you on that camera?

Defendant: What do you mean by private?

State: Pictures that perhaps show a man’s genitalia?

Defendant: Yes.

¶11 The jury convicted Jackson. At sentencing, the trial court imposed a twenty-five year bifurcated sentence, with twenty years of initial confinement and five years of extended supervision.

¶12 Jackson filed a postconviction motion alleging the ineffective assistance of trial counsel. In pertinent part, Jackson claimed that trial counsel should have objected to: (1) the “hearsay” testimony that the victim was informed by “unnamed friends” that Jackson was the shooter; (2) evidence that a gun magazine and pictures of Jackson’s genitalia were discovered during the search of his residence; and (3) the prosecutor’s unsubstantiated statement in closing argument that Jackson was found hiding in a bedroom in Arkansas.

¶13 After an evidentiary *Machner*<sup>5</sup> hearing, the trial court denied Jackson’s postconviction motion in a six-page written decision. The trial court set forth its findings concerning the context and defense theory of the case:

[T]he primary defense in this case was one of misidentification of Antonio Jackson as being the shooter. The primary focus of the defense was that there existed material differences between the physical characteristics of the shooter and the defendant in this matter as stated by the victim. These included an inability to identify the shooter by name, an assertion that the victim had never seen the shooter before, a height and weight differential, an erroneous description of the vehicle, and an assertion that the shooter had gold teeth. It should be pointed out that trial counsel adequately probed these critical areas at trial and argued them during closing argument.

¶14 The trial court found that trial counsel had a reasonable strategic reason for failing to object to references to “other people” because it was part of an attempt “to persuade the jury that the victim was influenced in his identification of the defendant as being the shooter based on the suggestion of unnamed individuals.”

¶15 With regard to the gun magazine, the trial court found that trial counsel had a valid strategic reason for failing to object based on her *Machner* hearing testimony that she did not wish to highlight the reference to the jury. The trial court further concluded that even if there was some error in failing to keep the evidence from the jury, it was harmless.

¶16 As to the prosecutor’s question to Jackson whether perhaps the camera contained pictures of “a man’s genitalia,” the trial court noted that the

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<sup>5</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

State originally limited its inquiry to the specific question approved by the trial court in Jackson's presence. The trial court noted that it was only after Jackson asked for clarification that the State used the word "genitalia." The court concluded that trial counsel was not deficient and that any undue prejudice was brought on by Jackson's own question:

The defendant cannot blame anyone but himself for its inclusion into the record, and certainly his counsel could not have predicted or rectified the situation once disclosed in front of the jury.

¶17 In addressing the reference to Jackson being discovered in Arkansas while hiding in the bedroom, the trial court found that it would have sustained an objection to this line of inquiry, but that trial counsel's failure to object was not prejudicial. In concluding that Jackson had failed to demonstrate prejudice from any asserted error, the trial court stated:

The Court is satisfied that the victim in this matter, who was within twelve to fifteen feet of his assailant and who positively identified the shooter with 100% certainty from a legally neutral photo lineup that had no identification markings, was the real evidence behind the jury verdict in this matter. The Court rejects that the singular or aggregate total effect of claimed error on the part of trial counsel undermines the confidence this Court has in the verdict in this matter.

¶18 Jackson maintains on appeal that trial counsel was ineffective. A criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111 ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. A defendant seeking to prove ineffective assistance must show both that counsel's performance was deficient and that this deficiency was prejudicial. *Thiel*, 264 Wis. 2d 571, ¶18. To satisfy the first prong, the defendant must demonstrate that counsel's performance fell below an



objective standard of reasonableness. *Id.*, ¶19. In evaluating counsel’s performance, a court’s review is “highly deferential” and there is a strong presumption that trial counsel’s conduct “falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. The reviewing court must make “every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*

¶19 The second prong requires proof of a reasonable probability that but for counsel’s deficient performance, the result of the proceeding would have been different. *Thiel*, 264 Wis. 2d 571, ¶20. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

¶20 Whether counsel’s actions were deficient or prejudicial is a mixed question of law and fact. *Id.* at 698. The circuit court’s findings of fact will not be reversed unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel’s conduct violated the defendant’s right to effective assistance of counsel is a legal determination, which this court decides de novo. *Id.* We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

¶21 We conclude that trial counsel’s failure to object to the victim’s testimony that “everybody” told him Jackson was the shooter was not deficient. At the postconviction hearing, the court found that trial counsel made a strategic decision not to object based on the theory of defense. *See Thiel*, 264 Wis. 2d 571, ¶21 (findings of fact include trial counsel’s conduct and strategy in light of the circumstances of the case). The trial court stated:

A review of the record indicates that [trial counsel] attempted to persuade the jury that the victim was influenced in his identification of the defendant as being the shooter based on the suggestion of these unnamed individuals. She placed directly before this jury that the victim obtained the name of the defendant from these individuals, and that these unnamed individuals provided him with the name of the defendant before he revealed it to the police. The issue was adequately presented to the jury, and the assertion that the victim was unduly influenced by these unnamed individuals as to identification was placed before this trier of fact.

¶22 The trial court’s finding is not clearly erroneous. At trial, counsel methodically elicited testimony that the victim neglected to inform officers of his pre-existing acquaintance with Jackson, and repeatedly highlighted that the photo identification took place only after the victim had discussed the incident with other people. This theory was the thrust of trial counsel’s closing argument. Similarly, at the *Machner* hearing, when asked why she did not object to the victim’s testimony that “everybody” told him the shooter must have been Jackson, trial counsel testified that she was trying to get across to the jury that the victim identified Jackson only after hearing his name from other people.

¶23 Additionally, any objection to the admissibility of the statements would have failed. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel’s failure to raise a legal challenge is not deficient if the challenge would have been rejected). The testimony that other people identified Jackson as the shooter was not inadmissible hearsay because it was offered to explain why officers compiled a photo lineup containing Jackson’s picture. The testimony was not offered for the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). There was no attempt to persuade the jury that these unnamed people had witnessed or had outside information relating to the shooting.

¶24 We also reject Jackson’s contention that counsel was ineffective for failing to object or prevent reference to the gun magazine. The trial court found that counsel’s failure to object was based on a reasoned decision to avoid highlighting the information, and this finding is not clearly erroneous. To the extent that trial counsel conceded that she could have filed a motion in limine to keep that evidence from the jury, we conclude that her performance was not prejudicial. It was made abundantly clear to the jury that the recovered gun magazine was unrelated to the shooting. Jackson denied ownership of the gun magazine and testified that he shared the bedroom with others. Jackson’s claim that the admission of this evidence affected the trial’s outcome is purely speculative. “A showing of prejudice requires more than speculation.” *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶25 In terms of the prosecutor’s question about the genitalia picture, while we agree with the trial court that Jackson, himself, apparently opened the door to this inquiry, we further conclude that Jackson was not prejudiced by this single, fleeting reference to his possession of a camera with a picture of “a man’s genitalia.” The picture was never shown to the jury and contrary to Jackson’s assertion, the brief allusion hardly suggests “the actions of a man of bad character with a violent, deviant personality.” Jackson has not met his burden to demonstrate prejudice. *Id.* (in an ineffective assistance of counsel claim, the defendant has the burden to affirmatively prove prejudice). We also conclude that trial counsel’s failure to object to the prosecutor’s unanticipated and justifiable question was not deficient.

¶26 Next, we conclude that trial counsel’s failure to address the prosecutor’s reference to Jackson “hiding” in a room in Arkansas was not prejudicial. The trial court specifically instructed the jury that the remarks and

closing argument of an attorney are not evidence, to disregard any remarks suggesting facts not in evidence, and to render a verdict “according to the evidence under the instructions given to you by this Court.” “Jurors are presumed to follow the court’s instructions.” *State v. Adams*, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). Further, the jury already knew that Jackson was extradited from Arkansas and, by his own admission, had instructed his ex-girlfriend to provide false information to the police. In view of this evidence and the strength of the State’s case, including the victim’s description and photo identification of the shooter, the State’s argument that Jackson might have been hiding in an Arkansas bedroom does not undermine our confidence in the integrity of the trial.

¶27 Finally, we reject Jackson’s argument that the cumulative effect of trial counsel’s errors entitles him to a new trial. We previously concluded that trial counsel did not perform deficiently by failing to object to the references to “unnamed friends” or the genitalia picture. With regard to the gun magazine and bedroom-hiding references, we determined that Jackson failed to demonstrate any prejudice and therefore we did not reach the deficient performance prong. We conclude that whether viewed separately or together, the magazine and hiding references do not undermine our confidence in the outcome of Jackson’s trial.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

